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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 15

CLARENCE DEBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

Appeal to the Supreme Court of Nebraska

Brief for the People of the State of California, Amicus Curiae in Support of Appellee

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INTEREST OF AMICUS CURIAE

The interest of the People of the State of California is in two of the three questions presented in the Jurisdictional Statement and the Brief for Appellant, which read as follows:

> 1. "Whether provision of Nebraska Juvenile Court Act denying trial by jury in juvenile court for offense which would be triable by a jury if committed by an adult violates juvenile's Sixth Amendment rights in light of this Court's decisions in *In re* Gault, 387 U.S. 1 [(1967)]; *Duncan v. Louisiana*, 391 U.S. 145 [(1968)]; and *Bloom v. Illinois*, 391 U.S. 194 [(1968)].

2. "Whether, in light of *Gault*, statute providing for proof by preponderance in delinquency proceeding, based on misconduct which would be felony if charged criminally, is invalid under Fourteenth Amendment."

The People of California have no interest in the third question which relates to the constitutionality of the procedure of the Nebraska statute by which the prosecutor has the sole discretion as to whether he will proceed in juvenile court or in criminal court. Under California law, the jurisdiction of the Juvenile Court is exclusive for children under 16 (Calif. Welf. & Inst. Code §§ 601(a), 707); it is initially exclusive for children between 16 and 18, with transfer to the criminal courts in the discretion of the judge pursuant to statutory procedures (Calif. Welf. & Inst. Code §§ 601(a), 707); and it is concurrent for minors between 18 and 21 (Calif. Welf. & Inst. Code §§ 607(2), 607(b)). In the latter case, although the county probation officer or district attorney may have initial discretion in selecting the court, the final determination is the responsibility of the juvenile court judge or the criminal court judge (Calif. Welf. & Inst. Code §§ 607(b), 707).

We do, however, have a substantial interest in the first two questions. Similar to the Nebraska statutes here involved, the California Juvenile Court Law[1] does not provide for a jury trial, and with some differences from the Nebraska Statute, provides that a preponderance of the evidence must be adduced to support a finding that the minor is a person within the jurisdiction of the Juvenile Court.

[1] Calif. Welf. & Inst. Code §§ 501 et seq. See also Welf. & Inst. Code §§ 1000 et seq. (Immigration and Delinquency).

California Welfare and Institutions Code Section 701 provides that the judge must first conduct a hearing to determine whether the minor (a person under 21) is a person described by sections 600, 601 or 602 of the Welfare and Institutions Code, and

> "for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of the evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."

If the court makes a finding that the minor comes within its jurisdiction, it then conducts a dispositional hearing (Welf. & Inst. Code §§ 702, 706). The court has various alternatives in treating the minor, some of which are dependent on the section giving rise to jurisdiction. See Calif. Welf. & Inst. Code §§ 725, 726, 727, 730, 731.

Among the alternatives for minors coming within section 601 and for those within section 602 if further proceedings, including a hearing, have been taken, is committment to the California Youth Authority (Welf. & Inst. Code §§ 730, 731, 1731) which has jurisdiction over educational train-

ing and treatment institutions maintained as correctional schools. See Welf. & Inst. Code § 1000. The court may also utilize the resources of the Department of Mental Hygiene, the Youth Authority, and public or private agencies or doctors for diagnostic medical, or psychiatric services, treatment or recommendations. See Calif. Welf. & Inst. Code §§ 703, 704, 705, 739, 740, 741. In any case, the commitment or disposition made by the juvenile court may be reviewed and modified at any time. See Welf. & Inst. Code §§ 729, 775-779.

The California Juvenile Court Law establishes a comprehensive and carefully planned system for the rehabilitation, treatment, and when necessary, for the incarceration of minors found to need such care after careful and complete adjudicatory and dispositional hearings. We believe that the standards of proof established by the legislature and the provision for hearing by a juvenile court judge rather than a jury fully protect the child's right to due process in such proceedings.

We appear before this Court as amicus curiae to uphold the validity of legislative standards established as part of comprehensive proceedings, which are neither criminal nor civil, but *sui generis*, designed to deal with the problems of juvenile delinquency, potential delinquency and neglect in a rational and humane manner.

SUMMARY OF ARGUMENT

It is established by statute, in California as in Nebraska, that in juvenile proceedings, the judge, rather than a jury, is the trier of fact, and the allegations on which jurisdiction is based may be proved by a preponderance of the evidence. It is the position of the People of the State of California that there is no violation of due process or equal protection

in this state legislative determination, whether or not the proceedings are concerned with conduct which is proscribed by the criminal law.

Juvenile proceedings should not be rigidly classified as either civil or criminal in nature; they are unique proceedings designed to deal with complex problems and for which the legislature may prescribe appropriate procedures. In *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967), this Court held that classification of juvenile proceedings as "civil" could not justify procedure which did not afford due process. Although appellant asserts that *Gault* held juvenile proceedings to be "criminal," requiring the application of all the procedures of a criminal trial, this Court was careful to adhere to the view expressed in *Kent* that a juvenile hearing need not conform with all the procedures of a criminal trial. We are in accord with this Court's flexible approach, and urge that it makes little sense to turn the rejection of a civil label into a mandate to impose rigid criminal procedures on proceedings which remain non-criminal in concept and function.

Juvenile proceedings are a unique response to a problem which, while similar in some aspects to the problems of the criminal law, involves areas of solely juvenile concern. Any due process theory in this field must take account of the qualitative differences of juvenile law. Such an approach by this Court, and the adoption of standards which make the qualitative differences determinative, would provide incentive for more functionally valid juvenile law.

California, like Nebraska, has established a comprehensive statutory scheme for dealing with juvenile problems. The non-criminal nature of these proceedings is unequivocally stated by both legislature and courts. Under this law, the Juvenile Court judge has a wide range of dispositional alternatives to serve the legislative goal of rehabilitation.

In California, one of these alternatives is commitment to the Youth Authority, an administrative agency with jurisdiction over training institutions maintained as correctional schools. The Youth Authority may parole or discharge the minor before majority, and the committing court may review and modify the commitment at any time. Any such commitment is based not on the conduct found but on full review of background and problems. Such proceedings have some apparent similarity to proceedings for narcotics and other "civil" commitments in which this Court has not required all the procedures of a criminal trial.

While the character of juvenile proceedings does not justify fundamental unfairness, it does justify judicial deference to legislative judgment. The legislatively established procedures at issue here do not violate due process.

Neither trial by jury nor proof beyond a reasonable doubt is constitutionally required as essential to due process in a juvenile case. In California, the procedures at issue were established after extensive conscientious review and evaluation. Reasoned analysis supports the legislative judgment.

Both the Governor's Special Study Commission in California, and the President's Task Force on Juvenile Delinquency have observed that it is a generally held view that jury trial is incompatible with the objectives of the juvenile law. There is much to support the judgment that trial by jury is not crucial to a system of juvenile justice. While courts and commentators are in some disagreement, the better reasoned opinions, in our view, follow this judgment. "The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function. . . ." *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9, 17 (1967).

Appellant's argument that *Duncan v. Louisiana,* 391 U.S. 145 (1968) and *Bloom v. Illinois,* 391 U.S. 194 (1968) have foreclosed further inquiry is both simplistic and circular. Moreover, it fails to take into account that rigid application of *Duncan and Bloom* does not fit the realities of the juvenile court system where incarceration may be possible for conduct not giving rise to a right to jury trial for adults or for conduct which does not involve crime at all and for which juries would be entirely inappropriate.

Finally his argument overlooks the problem of waiver. To apply the criminal standard is to force on a number of children incapable of waiving a "benefit" which is usually rejected when offered. To permit another standard of waiver is to recognize that the difference in the proceedings justifies deviance from the criminal model.

The Governor's Special Commission in California also recommended and the legislature adopted the preponderance of the evidence test as the standard of proof in juvenile cases. The commission found no valid reason for requiring the degree of proof customary in criminal cases, believing that the standard of preponderance of the evidence sufficiently safeguarded the rights of the minor. The California Supreme Court recently considered this requirement in the light of this Court's decision in *In re Gault,* and found no denial of due process. We call to the attention of this Court this carefully considered and perceptive opinion. *In re Dennis M.,* 70 A.C. 460, 75 Cal.Rptr. 1, 450 P.2d 296 (1969).

While reasonable men may differ as to the appropriate standard, we urge this Court to defer to the legislative judgments of the several states and permit re-evaluation and evolution to continue in this area without unnecessary constitutional rigidity.

In a juvenile case, the risk of failing to act may be greater than the risk of acting too quickly. We submit that it is no violation of due process to defer to the legislative judgment as to which risk is greater.

ARGUMENT

A LEGISLATIVE DECISION THAT A JUDGE RATHER THAN A JURY SHALL BE THE FINDER OF FACT AND THAT THE ALLEGATIONS MAY BE PROVED BY A PREPONDERANCE OF THE EVIDENCE IN A JUVENILE PROCEEDING, WHETHER OR NOT THE ADJUDICATION IS CONCERNED WITH CONDUCT WHICH VIOLATES THE CRIMINAL LAW, DOES NOT DENY THE JUVENILE EITHER DUE PROCESS OR EQUAL PROTECTION.

A. Juvenile Court proceedings are neither "criminal" nor "civil" but are unique proceedings for which the legislature may prescribe procedures appropriate to the special problems involved.

Appellant argues that this Court in *In re Gault,* 387 U.S. 1 (1967), made it clear that "a juvenile delinquency proceeding leading to incarceration is a criminal case." (Appellant's Brief at 14.) Thus, the argument continues, all of the procedures of a criminal trial must be followed in juvenile court proceedings. We disagree.

In *Kent v. United States,* 383 U.S. 541 (1966), and *In re Gault, supra,* this Court established the principle that a juvenile, no less than an adult, is entitled to due process in any proceeding which may result in the denial of substantial benefits or in his incarceration for a significant period of time. In *Kent,* interpreting the District of Columbia Juvenile Court Act "in the context of constitutional principles," this Court held that the exercise of the Juvenile Court's discretion to waive its exclusive jurisdiction was so "critically important" to the minor that he "was entitled to a hearing, including access by his counsel to

the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." *Id.* at 577. The reason this waiver of jurisdiction was so critically important was because of the special rights and immunities conferred on the minor by statute:

> "He . . . is shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The Court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection of the public cannot be adequately safeguarded without . . . removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Id.* at 556-57.

Although basing its decision on the benefits conferred, the court in *Kent* expressed some misgivings about the actual performance of Juvenile Courts, and raised doubts as to whether this performance "measured well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties available to adults." *Id.* at 555.

In *Gault,* this Court reached some of the questions raised but not answered in *Kent,* and held generally that procedural due process could not be denied a juvenile merely by classifying juvenile court proceedings as "civil" in nature. This Court went on to hold that certain procedural protections were essential requirements of due process in an adjudication hearing which could result in the incarceration of the juvenile: Notice, right to counsel, right to confront witnesses, and right against compelled self-incrimination.

The doubt expressed in *Kent* as to the performance of the juvenile court system was expressed in stronger terms in *Gault*. Where the emphasis in *Kent* was on the benefits of the juvenile court system which were taken from the child without "due process," the emphasis in *Gault* appeared to shift to the deficiencies of the juvenile court system. "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case." *Id.* at 29.[3] Even so, this Court reiterated the view put forth in *Kent, supra* at 562, that all the requirements of a criminal trial are not included in the due process required for juvenile proceedings:

> "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" *In re Gault, supra* at 30.

Thus, contrary to appellant's assertion, *Gault* and *Kent* held not that all criminal procedure is applicable to juvenile court proceedings but rather that due process requires a fair adjudication procedure and that this requirement cannot be evaded by a label. We are fully in accord with this flexible approach; even the basic non-criminal character

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3. The apparent shift in emphasis may perhaps be explained by the fact that Gerald Gault was "incarcerated" in a state "industrial school" for the remaining five years of his minority, while the adult criminal would have been fined up to $50 or imprisoned in jail for up to two months. Morris Kent, on the other hand, was sentenced in regular criminal proceedings (with the full panoply of due process protection) to from 30 to 90 years in prison. Had he been treated as a juvenile, his "incarceration" would have terminated at majority, again a period of five years. For a perceptive discussion of the basically inconsistent approach of these cases, see Welch, *Kent v. United States* and *In re Gault: Two Decisions in Search of a Theory*, 19 Hastings L. J. 29 (1967).

of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness. At the same time, it makes little sense to turn this Court's rejection of the "civil" classification into a mandate to impose a criminal label, and thus procedure, on proceedings which remain different in function, essentially non-criminal in concept and approach, and which are designed to deal with individuals who have problems, potential, and a commitment from society significantly different from adults.[4]

Juvenile proceedings are a unique response to a problem which is exceedingly complex and, while related in some aspects to the problems of the criminal law, covers areas of concern solely related to juveniles such as neglect, truancy, and incorrigibility. It has been pointed out that the question of the state's concern for and jurisdiction over children must be answered, not by the criminal law, but by a due process theory that takes account of the qualitative differences of juvenile law from both criminal and civil proceedings.

> "It is submitted that the Court's decision in *Gault* has left latitude for making such a distinctive constitutional determination in a 'truly noncriminal' context." Welch, *op. cit. supra* Note 3, at 38.
>
> "If criminal law procedure importation were to proceed apace from the *Gault* decision in total disregard of any constitutional effect for the special rights and immunities of juvenile law, as Justice Harlan predicts, it seems inevitable that 'rigid procedural requirements may inadvertently . . . [serve] to discourage . . . efforts to find more satisfactory solutions for the problems of juvenile crime . . . and development of

4. The history and philosophy of the Juvenile Court system were reviewed in *Gault* and *Kent*. See also, The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report:* Juvenile Delinquency and Youth Crime 2-7 (1967).

> the systems of juvenile courts.[5] Were the Supreme Court to adopt standards for the measurement of juvenile court due process which make qualitative differences in the effects of a delinquency determination and special treatment essential ingredients, it would insure a potent incentive for a more physically and functionally valid juvenile law system. As it is, the pressure to be very different from the criminal system as lessened proportionately to the degree of 'essential' procedural identity between the two systems." *Id.* at 39.

California, like Nebraska, has established a statutory system for dealing with the problems posed by juvenile crime, potential crime, various unique juvenile problems and neglect or need. The non-criminal nature of juvenile court proceedings is unequivocally stated in section 503 of the California Welfare and Institutions Code:

> "An order adjudging a minor to be a ward of juvenile court shall not be deemed a conviction of crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."

The California courts have consistently reiterated the view that juvenile proceedings are not criminal in nature but are proceedings in which the state seeks to relieve the minor of criminal responsibility and give him direction and rehabilitation. See, *e.g., People v. Dotson,* 46 Cal.2d 891, 895, 299 P.2d 875 (1956); *In re Castro,* 243 Cal.App.2d 402, 406-07, 52 Cal.Rptr. 469 (1966).

Under the California Juvenile Court Law, the court has a wide range of dispositional alternatives to serve these goals whether the child is neglected (§ 600), potentially delinquent (§ 601) or has committed acts which are adult crimes (§ 602). If the minor comes within section 602 of

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5 Footnote omitted; quotation from *In re Gault* at 77.

the Welfare and Institutions Code or if he is within section 601 and further proceedings have been undertaken, one of the alternatives available to the court is commitment to the California Youth Authority. See Welf. & Inst. Code §§ 730, 731, 777.[6] The California Youth Authority is an administrative agency with jurisdiction over educational training and treatment institutions maintained as correctional schools.

> "The Authority shall have charge of the persons committed or confined in each such institution, and shall provide for their care, supervision, education, training, employment, discipline, and government. It shall exercise its powers toward the correction of their faults, the development of their character, and the promotion of their welfare." Calif. Welf. & Inst. Code § 1004.

Commitment to the Youth Authority does not necessarily mean "incarceration" until majority. The Youth Authority may parole the minors under its charge, and may grant "honorable discharge" or leave of absence. Calif. Welf. & Inst. Code §§ 1176-79. Where a minor proves to be so incorrigible or so incapable of rehabilitation as to render his retention detrimental, the minor may be returned to court, where if over 16, he may be certified to the adult criminal court for criminal trial with all constitutional protections. Calif. Welf. & Inst. Code §§ 780, 707. While commitment is a dispositional alternative, the court has available all those dispositions available for both neglected or potentially delinquent children, including probation with

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6. In 1958, Youth Authority commitments on initial petitions were made in 2.2% of Juvenile Court cases. Report of the Governor's Commission on Juvenile Justice, Part 2, at 19. We are informed by the Bureau of Criminal Statistics that similar commitments were made in about 1.3% of the cases in 1967, the most recent year for which such statistics are presently available.

or without wardship, placement with an individual or agency for custody and care, or placement in a juvenile home, ranch or camp. Calif. Welf. & Inst. Code §§ 725-30. The court also may order medical diagnostic or psychiatric services utilizing both public and private facilities. Calif. Welf. & Inst. Code §§ 703, 704, 705, 739-41.

Finally, the court may review and modify the commitment or disposition at any time. Calif. Welf. & Inst. Code §§ 729, 775-79. It should be noted that commitment to a juvenile home or to the Youth Authority for placement in a correctional school is not limited to cases where a "crime" is charged as the basis for juvenile court jurisdiction, nor is commitment to the Youth Authority required even if jurisdiction is based on an act which would be a felony if committed by an adult. The disposition of the child is based on a full review of his background and problems including the specific behavior on which jurisdiction is based. Disposition is not designed to punish the child for this behavior; the proceedings of the juvenile court are essentially remedial. *In re Dennis M.*, 70 A.C. 460, 473, 75 Cal.Rptr. 1, 8, 450 P.2d 296, 303 (1969).

As pointed out by the Supreme Court of California, juvenile proceedings so characterized have some apparent similarities to proceedings for the involuntary commitment of mentally ill persons and narcotics addicts. *In re Dennis M., supra,* at 473, n. 11. This Court, while demanding that due process be accorded as a constitutional requirement in such special proceedings, has not required all the procedures of a criminal trial even though loss of liberty is not just a possibility but an inevitable result. See *Specht v. Patterson,* 386 U.S. 605 (1967); *Minnesota v. Probate Court,* 309 U.S. 270 (1940). Compare *In re Raner,* 59 Cal.2d 635, 381 P.2d 638, 30 Cal.Rptr. 814 (1963).

Appellant urges that a juvenile proceeding is a criminal case because it is based on volitional conduct, as "distinguished from conduct which is the product of mental disease or deficiency, or a status, such as dependency, alcoholism or being the victim of disease or contagion." (Appellant's Brief at 9). Appellant, we submit, has overlooked the entire rationale of these special juvenile proceedings—the juvenile is to be trained and rehabilitated, not punished. His behavior is a product of his immaturity, and his delinquency may be caused or aggravated by factors over which he has little or no control. In short, he is not being punished for his conduct; his conduct is symptomatic of a problem of growth and development which may be amenable to treatment, even where he must be incarcerated for the protection of himself or of society.

> "It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'well-nigh' conclusive. *Berman v. Parker,* 348 U.S. 26, 32 [1964]." *In re Gault, supra,* at 70 (Harlan, J., concurring and dissenting).

The fundamental issue is, of course, to what extent this deference is given where constitutional issues of procedural protection are involved. While the basic non-criminal character of juvenile proceedings does not justify arbitrariness or a denial of fundamental fairness, we urge that it does justify judicial deference to legislative judgment which establishes the procedures at issue here as part of a detailed statutory scheme enacted specifically to provide fundamental fairness in proceedings undertaken in the child's best interests.

B. Neither trial by jury nor proof beyond a reasonable doubt is constitutionally required as essential to due process in a juvenile case.

The California Juvenile Court Law was extensively revised in 1961 as a result of recommendations made by the Governor's Special Study Commission on Juvenile Justice in the course of a study of all phases of Juvenile Justice in California. The recommendations made were the "product of an extensive conscientious process of review and re-evaluation in which numerous local juvenile and judicial officials throughout the state actively participated." Report of the Governor's Special Commission on Juvenile Justice, Part I, at 10. The procedural scheme recommended by the commission and accepted by the legislature did not provide for jury trial and established the degree of proof required as a preponderance of the evidence. Despite significant changes subsequent to *Gault*, these particular procedural requirements have remained unchanged.[7] Setting aside appellant's argument that *Gault* is necessarily a mandate to impose a rigid criminal label and procedure on juvenile proceedings, we submit that reasoned analysis supports the legislative judgment on both issues.

1. JURY TRIAL

In its 1961 study, the California Commission commented on jury trial in juvenile cases:

> "The generally held view, shared by the commission and all of California's juvenile court judges, is that the jury system is incompatible with the philosophy

7. As pointed out by the California Supreme Court in *In re Dennis M.* at 469, the California legislature has been fully responsive to *Gault* by adopting numerous amendments designed to implement *Gault*. See Calif. Stats. 1967, ch. 507, 1355, 1356.

of the juvenile court law." Report of the Governor's Special Study Commission on Juvenile Justice, Part II, at 19.

A survey of 25 judges in the largest California counties revealed all were opposed to such trials, their comments suggesting that jury trials would be in conflict with juvenile court philosophy and would destroy the protective purpose of the court. It was noted that the publicity attracted would go far to eliminate the confidentiality necessary for effectiveness. *Ibid.*

To similar effect is the discussion by the President's Task Force on Juvenile Delinquency in 1967:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
>
> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which

typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect and emotion rather than a more businesslike presentation.

"A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.,* incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

"As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. 'This too might be lost, and justice still be done.'" The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime,* at 38 (1967).

The courts and commentators which have considered the issue have disagreed on its resolution, with the better reasoned opinions, in our view, taking the position that a jury

trial is not an essential part of due process in a juvenile proceeding.[8]

This issue was analyzed at length in *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1967). The Pennsylvania appellate court reached the conclusion that jury trial is not a requirement of due process in juvenile proceedings.

> "In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a balance by injecting procedural orderliness into the juvenile court system. . . . It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards." 234 A.2d at 15-16.

The court viewed *Gault* as an

> "invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds." *Id.* at 16.

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8. *Compare Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968); *Shone v. State*, 237 A.2d 412 (Maine 1968); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508, 519 (1968) (minority opinion); *Estes v. Superior Court*, 438 P.2d 205 (Wash. 1968); *In re Agler*, 15 Ohio App.2d 240 (1968); and *Commonwealth v. Johnson*, 211 Pa. Super. 62, 234 A.2d 9 (1968) *with Nieves v. United States*, 280 F.Supp. 994 (S.D.N.Y. 1968); and *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968). See also, *In re Dennis M.*, 70 A.C. 460, 471-72 (1969) (by implication—jury trial not required). Commentators are similarly divided. *Compare* Welch, *op. cit. supra;* Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 559 (1957) *with* Anticau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 399-400 (1961); Dorsen & Rezneck, *Gault and Juvenile Law*, 1 Family Law Q. No. 4; 1, 22-23 (1967). See generally, Annot. 100 A.L.R.2d 1241 (1968). As appellant points out, the majority of jurisdictions do not provide for jury trial in juvenile cases. Appellant's Brief at 12-13, n. 7, 8.

The court reviewed the responsibilities of the juvenile court judge, finding, in essence, that he must be more than a trier of fact.

> "[H]e must, in a unique manner, establish a relationship that will permanently alter the behavior patterns of the child." *Id.* at 17.

The insertion of jury trials would sorely limit the juvenile court judge in carrying out his special tasks. *Ibid.*

> "[W]e find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children." *Ibid.*

Johnson was decided before this Court's decision in *Duncan v. Louisiana,* 391 U.S. 145 (1968), made the right to jury trial an element of due process applied to state criminal trials. The highest court of Kentucky considered the effect of *Duncan,* but nonetheless followed the Pennsylvania court in *Johnson.* In *Dryden v. Commonwealth,* 435 S.W. 2d 457 (Ky. 1968), the court was unwilling to equate a juvenile proceeding with a criminal trial even though the basis might be conduct which would be a crime if committed by an adult. The court noted that if institutionalization may be the result, "it can make no sensible difference whether he is charged with having committed a criminal offense, of truancy, of habitual disobedience to his parents, or of being dependent, neglected, needy or abandoned." *Id.* at 461. The court continued:

> "A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge." *Ibid.*

Appellant, however, by the simple expedient of labeling a juvenile proceeding a criminal trial, argues that this court's decision in *Duncan v. Louisiana, supra,* and in *Bloom v. Illinois,* 391 U.S. 194 (1968), "have so completely mooted the arguments, pro and con, that no further explication is necessary." Appellant's Brief at 19. We submit that such an approach is not only simplistic but circular. Our inquiry is whether, despite legislative judgment to the contrary, due process requires a jury trial in juvenile proceedings, which may or may not involve "criminal" conduct; may or may not result in incarceration; and do not involve "crime in the ordinary sense; . . . a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois, supra,* at 201.

Moreover, appellant's argument fails to take into account the fact that a rigid application of *Duncan and Bloom* simply does not fit the realities of the juvenile court system. He argues that jury trial should be provided for in the juvenile court whenever a child is charged with a "crime" which for an adult gives rise to a right to jury trial. *Duncan and Bloom* establish this right for "serious crimes," apparently those with possible sentences of greater than six months. In juvenile cases, commitment for a potentially longer period may be ordered in cases where an adult would not be entitled to a jury trial and in cases not involving crimes at all.

If the right to jury trial is based on the potential commitment, then we must ask juries to find juveniles "guilty" of conduct which is not crime, and which is not subject to precise definition. As pointed out by the President's Task Force on Juvenile Delinquency as quoted, *supra*.

> "Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms."

In the statutory scheme established in California, when commitment is ordered, it is not determined by the conduct charged, but on the basis of factors developed in the dispositional hearing. The conduct serves only to give the court jurisdiction to proceed. This is the truly important distinction between adult and juvenile cases.[9]

> "The fact of exposure to incarceration at all, a qualitative consideration, seems, in light of the fourteenth amendment's specific concern for preserving individual liberty, to be an appropriate basis for prescribing procedural safeguards aimed at ensuring the reliability of determinations that state intervention is warranted. The right to counsel, reliable evidence, standard of proof, cross-examination, and transcript of record all relate to reliability. Other procedural aspects of criminal prosecution, such as probable cause for apprehension, the right to bail, the right to trial by jury, the privilege against self-incrimination and exclusionary rules for evidence obtained by trespassory searches and seizures, should not be applied verbatim to juvenile proceedings without due consideration of qualitative differences in incarceration and other differences in juvenile law.

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9. It was apparently the "tokenism" of this dispositional hearing that concerned this Court in *Gault:* "The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society

> "Rather than holding that qualitative aspects of incarceration are 'of no constitutional consequence' and that other statutory 'rights and immunities' afforded the juvenile are 'in no way involved,' the cause of juvenile correction would be better served by a holding that made these 'differences' essential to the constitutionality of carefully tailored 'noncriminal' procedures, while insisting upon the realization of these differences *in fact* in individual cases through appropriate review by appeal and habeas corpus." Welch, op. cit. *supra,* at 35.

Appellant further argues that "lurking just beneath the surface of all arguments that juveniles must not have juries, is the fear that, in some cases, a jury might acquit a juvenile and thus spare him from the benevolent rehabilitation techniques of the state." Appellant's Brief at 17.

While it is possible to argue that one rationale for jury trials in criminal cases is the ability of the jury to ignore the letter of the law and return a verdict based on other considerations, this rationale, even if valid, is completely inappropriate to juvenile cases where the primary objective is to help the child. It may be a "victory" for an adult charged with crime to be relieved of punishment because it is too severe, or because the underlying reasons for his behavior elicit sympathy. It can hardly be considered a victory for anyone, least of all for the juvenile, if a jury irrationally "acquits" a juvenile whose behavior shows he needs help. See Paulsen, *Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Supreme Court Review 167, 189 (1966).

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unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility the boy could be disciplined and dealt with at home, despite his previous transgressions. (Footnotes omitted.) *Id.* at 28.

Finally, appellant ignores the problem of waiver which would result from the wholesale importation of criminal law procedures into the juvenile court system, particularly where the "right" in question is of highly debatable benefit or utility. The obvious problems of waiver by a juvenile have been recognized. See, *e.g., In re Gault, supra,* at 55; Comment, *The Juvenile Court Revolution in Washington,* 44 Wash. L. Rev. 421, 432-33 (1969). It has been stated that there are two issues involved: (1) What is the standard for an effective waiver; and (2) who has the authority to waive the juvenile's rights. *Ibid.*

If a juvenile court proceeding is a criminal trial, and the adult "protections" are to apply to the juvenile in full force, then he must have a jury trial as a constitutional right unless he has knowingly and intelligently waived it. *Cf., In re Gault, supra,* at 42. If anyone but the juvenile is able to waive this right, then we are applying a different standard to juveniles, impossible under the rationale that the differences in juvenile court proceedings do not justify deviation from the criminal law model. Thus, there will be some juveniles who will be incapable of waiving.

Yet, even in the sizable number of jurisdictions which provide by statute for a jury trial, the "right" is rarely exercised; most juveniles, or their parents or counsel, choose the informality, privacy, and expertize of a court proceeding. See Paulsen, *op. cit. supra,* at 186; *Peyton v. Nord, supra,* at 726. Thus, the unconscionable result of establishing the criminal jury trial as a constitutional right in a juvenile proceeding is to force the child incapable of waiving to participate in a jury trial which most legislatures have weighed and found wanting, and which those

children capable of making an intelligent choice or their representatives nearly invariably reject.[10]

To answer that the problem does not exist because parent or counsel may waive the right is inevitably to recognize that the difference in proceedings concerning juveniles justifies different standards than those applied to adults. If this is so, then we fail to see why these same differences do not justify judicial deference to the legislative "waiver" made for all juveniles on the basis that their interests are not best served by a jury trial.

2. STANDARD OF PROOF

As part of the general revision of California juvenile law in 1961, the Governor's Commission recommended and the legislature enacted section 701 of the Welfare and Institutions Code which provides in pertinent part that

> "a preponderance of the evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of the evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."[11]

The Commission's comment on this section reads as follows:

> "The Commission believes these objectives [preserving the guarantee of due process to the minor, and establishing an informal court atmosphere so that po-

10. This should be contrasted with the situation in the adult criminal courts. "The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so." *Gault* at 154. "[T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court." *Id.* at 158.

11. Thus, the section differs somewhat from the Nebraska law which provides for hearings, to a judge, to be conducted in an informal manner "applying the customary rules of evidence in use in civil trials without a jury in the district courts." Nebraska Statutes 43-206.03 (2) (See Appellant's Brief at 43).

tentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged] can be attained by applying rules of evidence routinely observed in the trial of any other cause in a court of law *with one important modification,* that such rules are to be applied only to test sufficiency of evidence and not to be applied as rules of admissibility. Thus, any matter relevant and material to the past or present conduct, welfare, or care of the minor, and any matter material and relevant to the acts or circumstances which are alleged to bring him within the court's jurisdiction, should be received in evidence. However, competent evidence, not subject to timely objection by competent counsel, must be adduced to support a finding of wardship.

"All of the reasons for employing rules of evidence in other judicial proceedings, *e.g.,* to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect.

. . .

"On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing." Report of the Governor's Special Commission on Juvenile Justice, Part I at 30.

This provision of the California Juvenile Court Law establishing the standard of proof was recently considered by the California Supreme Court in light of *Gault. In re Dennis M.,* 70 A.C. 460, 75 Cal.Rptr. 1, 450 P.2d 296 (1969).

In an exhaustive and carefully considered opinion, the California court found no denial of due process in the application in juvenile proceedings of the standard of proof established by the legislature. We have little to add to the perceptive review made by that court. The relevant portion of the opinion is quoted below for the convenience of this Court.[12]

> "We meet at the outset a contention advanced by appellant at oral argument; i.e., that the United States Supreme Court decision in *In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428], compels the state to establish the facts supporting a charge of juvenile delinquency by the criminal standard of proof 'beyond a reasonable doubt.' We do not so read *Gault*. It is true, of course, that the decision inaugurated a sweeping constitutional reform of the rights of juveniles in this country. It drew from the teaching of earlier cases the fundamental proposition that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone' (387 U.S. at p. 13 [18 L.Ed.2d at p. 538] [and laid] down specific guidelines for implementing those guarantees in juvenile proceedings. Yet in so doing the court took repeated pains to limit its holding by warning that 'We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." '(*Ibid.*) First, the decision was intended to affect only the adjudicatory stage of juvenile proceedings, and then only when the outcome may be commitment to a state institution. (*Ibid.*) Secondly, the court made it clear that even if the foregoing conditions are met, the Constitution does not require that the full panoply of rights accorded to an adult accused

12. Footnotes in quoted material are numbered as in original.

of crime be erected in the juvenile court. (*Id.* at pp. 27, 30 [18 L.Ed.2d at pp. 546, 547-548].) Rather, the opinion (at pp. 30-31 [18 L.Ed.2d at pp. 547-548]) adopts for juvenile court adjudications of delinquency the holding of *Kent v. United States* (1966) 383 U.S. 541, 562 [16 L.Ed.2d 84, 98, 86 S.Ct. 1045], that 'the hearing must measure up to the essentials of due process and fair treatment.' Those essentials, as the remainder of the opinion spells out, are (1) adequate notice of the charges, (2) assistance of counsel, (3) opportunity for confrontation and cross-examination, and (4) the privilege against self-incrimination. (387 U.S. at pp. 31-57 [18 L.Ed.2d at pp. 548-563].)

"Not only is standard or quantum of proof missing from the foregoing itemized list, but the court expressly declined to reach this very issue. In the course of its opinion below, the Arizona court had ruled on the question of the appropriate standard of proof in juvenile cases; referring inter alia to that ruling, the United States Supreme Court stated (387 U.S. at pp. 10-11 [18 L.Ed.2d at pp. 536-537]) that 'We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution.' And one year later the court again refrained from deciding the issue.[5]

"We infer that at least for the present the Supreme Court has left this matter to the states and the lower federal courts. The results, however, are still highly

5. In *In re Whittington* (1967) 13 Ohio App.2d 11 [42 Ohio Ops.2d 39, 233 N.E.2d 333], a 14-year-old youth had been adjudged a delinquent after a finding on a preponderance of the evidence that he had committed second degree murder. In affirming, the Ohio court rejected a contention that the proof of such conduct must be made beyond a reasonable doubt. The United States Supreme Court granted certiorari and heard oral argument, but ultimately chose not to reach the merits; rather, it vacated the judgment and remanded the case for reconsideration in the light of *Gault*, which had been decided in the interim.

inconclusive. At least three different formulae have been sanctioned. The great weight of authority holds that in juvenile proceedings the general civil standard of proof by a preponderance of the evidence governs. (See cases collected in Note, 43 A.L.R.2d 1128, 1138-1141.) Some courts, including the Arizona Supreme Court in *Gault* itself, have adopted the special civil standard of proof by 'clear and convincing evidence.' (See, *e.g. Application of Gault* (1965) 99 Ariz. 181 [407 P.2d 760, 768].) And the few jurisdictions to consider the issue since *Gault* are divided: in Illinois and Texas it has been held that the criminal standard of proof beyond a reasonable doubt is now constitutionally compelled in juvenile cases (*In re Urbasek* (1967) 38 Ill.2d 535 [232 N.E.2d 716]; *Santana v. State* (Tex. Civ.App. 1968) 431 S.W.2d 558; see also *United States v. Costanzo* (4th Cir. 1968) 395 F.2d 441, 445 [applying the more limited terms of the federal juvenile statute]; *DeBacker v. Brainard* (1968) 183 Neb. 461 [161 N.W. 2d 508, 513] [dissenting opinion by four justices; state constitution requires concurrence of five to hold a statute unconstitutional]), while the District of Columbia Court of Appeals has adhered to its pre-*Gault* adoption of the preponderance of the evidence test (*In re Wylie* (D.C. Mun. App. 1967) 231 A.2d 81, 84).

"In California we do not write upon a clean slate. For the first half-century of their existence our juvenile court statutes contained no provision on this topic, and a wide variety of standards of proof was in actual use.[6] In 1957, however, a special commission was created to survey and evaluate the administration of juvenile justice in this state and submit recommendations for legislative action. After three years of field

6. Many trial judges voluntarily applied rules of evidence in contested cases. But both 'civil rules' and related criminal rules were invoked, and in the latter category approximately one-half of the judges used the reasonable doubt standard and one-half used preponderance of the evidence. (Rep. of Governor's Special Study Com. on Juvenile Justice (1960) pt. II, pp. 9-10.)

studies, hearings, drafts, and conferences with experts and practitioners alike, the commission filed its report. On the important issue of procedural rules, the commission posited that 'The problem in attempting to establish acceptable juvenile court procedures is to attain a working balance between two essential objectives—first, preserving the guarantee of due process to the minor; and second, establishing an informal court atmosphere so that potentially harmful effects of the proceedings are minimized and the minor's receptivity to treatment is encouraged.' (Rep. of Governor's Special Study Com. on Juvenile Justice (1960), pt. I, p. 29.) Mindful of both of these goals, the commission concluded (at p. 30) that 'All of the reasons for employing rules of evidence in other judicial proceedings, *e.g.*, to insure truthful, reliable, and fair testimony, apply with equal force to a hearing on a minor's delinquency or a hearing in which a child may be removed from his family because of parental neglect. . . . On the other hand, the Commission sees no valid reason for requiring the degree of proof customary in criminal cases. It is our opinion that requiring proof of the jurisdictional facts by a preponderance of evidence will sufficiently safeguard the rights of the minor so long as the court scrupulously observes the presumptions of lawful conduct and circumstance until the allegations are actually proven in open hearing.' Accordingly, the commission recommended that the standard of proof in juvenile court matters be a preponderance of the evidence, and the Legislature so provided (Stats. 1961, ch. 1616, p. 3482.)[7]

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7. Now Welfare and Institutions Code section 701, the statute declares in relevant part that "a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601."

"The Legislature, moreover, has been fully responsive to *Gault*. Many of the safeguards required by *Gault* had already been incorporated into our law six years before that decision, as the opinion itself recognizes. (387 U.S. at p. 37 fn. 63 [18 L.Ed.2d at pp. 551-552].) Nevertheless, in its 1967 session the Legislature adopted numerous amendments designed to comply with the entire mandate of *Gault*, by implementing in considerable detail the juvenile's right to notice, to counsel, to confrontation and cross-examination, and his privilege against self-incrimination. (Stats. 1967, chs. 507, 1355, 1356; see generally Gardner, *Gault* and *California* (1968) 19 Hast. L.J. 527, 532-539.)

"Such deliberate acts of the Legislature come before us clothed with a presumption of constitutionality. 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]' (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484 [171 P.2d 21, 166 A.L.R. 701]; accord, *State of California v. Industrial Acc. Com.* (1957) 48 Cal.2d 365, 371 [310 P.2d 7]; *In re Davis* (1966) 242 Cal.App.2d 645, 651 [51 Cal.Rptr. 702].) No such showing is here made with regard to the statutory standard of proof in juvenile matters.

"In contrast to a number of the fundamental guarantees of Anglo-American criminal law which can trace their sources back to the Magna Carta or even earlier (*e.g., Duncan v. Louisiana* (1968) 391 U.S. 145 [20 L.Ed.2d 491, 88 S.Ct. 1444] [right to trial by jury]; *Klopfer v. North Carolina* (1967) 386 U.S. 213 [18 L.Ed. 1, 87 S.Ct. 988] [right to speedy trial]), the standard of proof 'beyond a reasonable doubt' is a relatively recent development. It appears to have had its origin at the end of the Eighteenth Century, and

to have first passed through a variety of differing and tentative formulations. (9 Wigmore, Evidence (3d ed. 1940), p. 317.) Although it is now codified in our statutes (Pen. Code § 1096), it is not mentioned in either the California or federal Constitutions. For present purposes, however, we may assume that it is part of the due process of law guaranteed in criminal cases by the Fourteenth Amendment. (See *Speiser v. Randall* (1958) 357 U.S. 513, 525-526 [2 L.Ed.2d 1460, 1472-1473, 78 S.Ct. 1332].) The question remains, does *Gault* require, by implication, that this element of adult criminal trials be incorporated into our juvenile court law?

"Prior to *Gault* it was squarely held that by reason of the fundamental differences in nature and purpose between a criminal prosecution and a juvenile proceeding, the use in the latter of the preponderance of the evidence standard prescribed by Welfare and Institutions Code section 701 does not constitute a violation of either due process or equal protection of the law. (*In re Johnson* (1964) 227 Cal.App.2d 37, 39 [38 Cal.Rptr. 405]; *cf. In re Castro* (1966) 243 Cal. App.2d 402, 408 [52 Cal. Rptr. 469].) Unless those differences have been obliterated by *Gault*, the *Johnson* holding remains the law of this state. (See, *e.g., In re Jones* (1967) 256 Cal.App.2d 240, 243-244 [63 Cal.Rptr. 748] [post-*Gault* appeal from declaration of wardship based on charge of attempted arson; preponderance of the evidence standard applied without discussion].) We do not deny that *Gault* casts doubt on the traditional *parens patriae* theory, and exposes many defects in its practice; but we also take the high court at its word when it reiterates that under the Constitution the juvenile court hearing need not 'conform with all of the requirements of a criminal trial or even of the usual administrative hearing' (387 U.S. at p. 30 [18 L.Ed.2d at p. 548], quoting from *Kent v. United States*

(1966) *supra*, 383 U.S. 541, 562 [16 L.Ed.2d 84, 97].) Indeed, the opinion is replete with language admonishing that the new rules there laid down should not be taken to spell the end of the juvenile court process *per se*, and that many of its unique attributes can and should be preserved.[8]

In a thoughtful decision reviewing the just quoted language of *Gault*, a Pennsylvania appellate court has concluded that 'those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. . . . It has not suggested that we discard the flexibility which has long been the hallmark of

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8. '. . . the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.' (Fn. omitted; 387 U.S. at p. 21 [18 L.Ed.2d at p. 543].)

'We do not mean . . . to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue.' (Fn. omitted; *id.* at pp. 22-23 [18 L.Ed.2d at pp. 543-544].)

'Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce *some* elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, . . .' (Italics added; *id.* at pp. 26-27 [18 L.Ed.2d 545-546].)

juvenile courts, but that we temper it with certain procedural safeguards. . . . [W]e are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through *Gault*, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques." (*Commonwealth v. Johnson* (1967) 211 Pa. Super. 62 [234 A.2d 9, 15-17].)

"The issue before the Pennsylvania court was whether *Gault* required, by implication, that the right to a jury in adult criminal trials be incorporated into juvenile court law. The court held that it did not, reasoning that 'the institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.' (*Id.* at p. 17; accord, *Dryden v. Commonwealth* (Ky.App. 1968) 435 S.W.2d 457; *In re Fletcher* (1968) ....Md. App..... [248 A.2d 364]; *People v. 3656, 3658,* Y.O. (Sup.Ct. 1968)..... N.Y.S.2d .....)

"Although the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system, to do so would nevertheless introduce a strong tone of crim-

inality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after *Gault*, as we have seen, juvenile proceedings retain a *sui generis* character; although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt' come into play: e.g., the advantages of maintaining a noncriminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code.[9] Thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best intgrests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.'[10]

9. [Footnote omitted.] [Sets forth Welf. & Inst. Code §§ 600, 601].

10. Even in adult criminal trials, of course, the standard of proof 'beyond a reasonable doubt' applies only to the issue of guilt itself. A variety of lesser standards of proof governs other issues that may arise in the course of such proceedings:

(1) 'Slight' or 'prima facie' showing: proof of corpus delicti (*People v. Amaya* (1952) 40 Cal.2d 70, 76 [251 P.2d 324]).

(2) 'Preponderance of the evidence': territorial jurisdiction of the crime (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 262 [282 P.2d 53]); venue in the proper county (*People v. Megladdery* (1940) 40 Cal.App.2d 748, 764 [106 P.2d 84]); defendant's absence from the state, as tolling the statute of limitations (*People*

"In any event, we cannot say that the Legislature plainly exceeded constitutional limits in finding that the benefits of the reasonable doubt standard would be outweighed by the adverse effects of imposing that doctrine of adult criminal law on the essentially remedial proceedings of the juvenile court.[11]

"Turning to the writings of legal scholars on the question, we find a wide divergence of views. To begin with, in the appellate decisions and statutes of our sister states, as noted above, the weight of authority heavily favors the standard of preponderance of the evidence. Under analogous circumstances, the United States Supreme Court was called upon to decide whether the due process clause was violated by an Oregon statute requiring an accused who pleaded insanity to bear the burden of establishing that defense beyond a reasonable doubt. (*Leland v. Oregon* (1952) 343 U.S. 790 [96 L.Ed. 1302, 72 S.Ct. 1002].) The high court reasoned (at p. 798 [96 L.Ed. at pp. 1308-1309]), 'Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no prac-

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v. McGill (1935) 10 Cal.App.2d 155, 159-160 [51 P.2d 433]); proof of insanity by defendant (*People v. Daugherty* (1953) 40 Cal.2d 876, 901 [256 P.2d 911]); defendant's proof of entrapment (*People v. Valverde* (1966) 246 Cal.App.2d 318, 325 [54 Cal.Rptr. 528]); *cf. Estate of Nelson* (1923) 191 Cal. 280, 286 [216 P. 368] [proof of guilt of a crime, when at issue in a civil case].

(3) 'Preponderance of substantial evidence': proof of other crimes committed by defendant, to show identity through a common *modus operandi* (*People v. Durham* (1969) ante, [70 A.C. 179, 196 fn. 15, 74 Cal.Rptr. 262, 449 P.2d 198]).

(4) 'Clear and convincing evidence': defendant's burden to support a motion to withdraw a guilty plea (*People v. Brotherton* (1966) 239 Cal.App.2d 195, 200 [48 Cal.Rptr. 513]).

11. Thus characterized, their similarity to proceedings for the involuntary commitment of mentally ill persons or narcotic drug addicts becomes readily apparent. In the latter, the possibility of

tical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conculusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [78 L.Ed. 674, 677, 54 S.Ct. 330, 90 A.L.R. 575] (1934). (Fn. omitted.) The court then concluded (at p. 799 [96 L.Ed. at p. 1309]), 'We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.'

"The draftsmen of model acts have proposed the adoption, at various times, of each of the three standards of proof mentioned herein. In 1959 the United States Children's Bureau took the view that the standard should be preponderance of the evidence. (Comment to § 19 of the Standard Juvenile Court Act (1959) 5 Nat. Prob. & Parole Assn. J. 370.) In 1966, however, in a publication quoted and relied on by the Supreme

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confinement for a substantial period of time likewise requires observance of basic rules of due process (see *In re Raner* (1963) 59 Cal.2d 635 [30 Cal.Rptr. 814, 381 P.2d 638]); yet in an opinion holding the Fourth Amendment and the exclusionary rule applicable to narcotics addiction commitments (*People v. Moore* (1968) 69 A.C. 701 [72 Cal.Rptr. 800, 446 P.2d 800]) we recently rejected a contention that the state must prove the fact of addiction beyond a reasonable doubt rather than by a preponderance of the evidence, observing that such proceedings 'are fundamentally civil in nature' (*id.* at p. 713). The issue, moreover, was purely one of decisional law, there being no legislative directive on standard of proof in the narcotics addiction commitment statutes. (Welf. & Inst. Code, §§ 3000-3305.)

Court throughout its *Gault* opinion (see, e.g., 387 U.S. at p. 38 [18 L.Ed.2d at p. 552], characterizing the work as 'authoritative'), the Children's Bureau recommended the special civil standard of clear and convincing evidence as a 'middle of the road position' or 'reasonable compromise' between the majority civil standard and the minority criminal standard. (Standards for Juvenile and Family Courts (1966), U.S. Dept. of Health, Education and Welfare, Children's Bureau Pub. No. 437, p. 72). In 1968 the Council of Judges of the National Commission on Crime and Delinquency also recommended the clear and convincing evidence standard, observing that an adjudicatory juvenile hearing 'is not bound by the criminal procedure requirement of proof beyond a reasonable doubt.' (Model Rules for Juvenile Courts (proposed final draft, May 1968), rule 26 and comment thereto.) By contrast, the National Conference of Commissioners on Uniform State Laws adopted the Illinois position (*In re Urbasek* (1967) *supra*, 232 N.E.2d 716) in requiring proof beyond a reasonable doubt in delinquency cases, but remained satisfied with the clear and convincing evidence standard in determining neglect or need of treatment. (Uniform Juvenile Court Act (final draft, August 1968), § 29.)

"Similar disarray reigns in the recommendations of the law review writers. Even prior to *Gault*, contrary positions had been taken (compare Paulsen, *Fairness to the Juvenile Offender* (1957) 41 Minn.L.Rev. 547, 562-563 (disapproving reasonable doubt standard), with Antieau, *Constitutional Rights in Juvenile Courts* (1961) 46 Cornell L.Q. 387, 412 (approving reasonable doubt standard)); since *Gault*, the views have proliferated. Some authors call for extension of the reasonable doubt standard to juvenile proceedings (Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law* (1967) 1 Fam. L.Q. 1, 26-27; Comment, *In re Gault and the Persisting Questions of Procedural Due*

Process and Legal Ethics in Juvenile Courts (1968) 47 Neb. L.Rev. 558, 579-580), while others resist such a step (Welch, *Kent v. United States and In re Gault: Two Decisions in Search of a Theory* (1967) 19 Hast. L.J. 29, 36-38, 40-45) and criticize the courts that have taken it (Note (1968) 19 Syracuse L.Rev. 1041, 1046). The majority, however, propose compromise solutions of varying content. (See, *e.g.*, Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal* (1967) 53 Va.L.Rev. 1700, 1713 (a higher standard of proof than preponderance of the evidence, but not reasonable doubt unless right to jury trial is also granted); Lemert, *The Juvenile Court—Quest and Realities, In Task Force Report: Juvenile Delinquency and Youth Crime* (1967), p. 103 (favoring clear and convincing evidence standard, with reasonable doubt standard reserved for 'the most grievous juvenile law violations'); Boches, *Juvenile Justice in California: A re-evaluation* (1967) 19 Hast. L.J. 47, 92-93, 102 (preferring reasonable doubt standard, but 'at least' clear and convincing evidence); Foster, *Notice and 'Fair procedure': Revolution or Simple Revision?, in Gault: What Now for the Juvenile Court?* (Inst. Cont. Legal Ed. 1968), pp. 66-67 (reasonable doubt standard when deprivation of liberty is threatened, preponderance of the evidence in other cases); George, *Gault and the Juvenile Court Revolution* (Inst. Cont. Legal Ed. 1968), pp. 58-59 (reasonable doubt standard in delinquency cases, clear and convincing evidence standard in neglect cases.) If any lesson can be learned from this diversity of proposals, it is that no consensus exists among the scholars to support the proposition that *Gault* requires the use of the reasonable doubt standard in juvenile proceedings.

"In the light of the foregoing analysis, we cannot conclude that the standard of proof provision of Welfare and Institutions Code section 701 (*ante*, fn. 7) is 'clearly, positively and unmistakably' unconstitutional.

(*Lockheed Aircraft Corp. v. Superior Court* (1946) *supra*, 28 Cal.2d 481, 484.) Accordingly, in the absence of a specific ruling on the issue by the United States Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard is valid and No constitutional rights of the appellant have been infringed by the use of the preponderance of evidence test to determine the truth of the allegation that he had committed a crime." (*In re Johnson* (1964) *supra*, 227 Cal.App.2d 37, 40.)" *In Re Dennis M.*, 71 A.C. at 466-76.

Shortly after the decision in *Dennis M.*, the highest court of the State of New York reached the same conclusion. *In the Matter of Samuel W.*, No. 616, ___ N.Y.2d ___, (1969). As pointed out in *Dennis M.*, both courts and commentators have reached different conclusions as to the standard which should be used. We do not argue that reasonable men cannot differ as to which standard is wisest or best. We do urge this Court to defer to the legislative judgments of the several states, and permit the continued re-evaluation and evolution of the laws dealing with juveniles to proceed without unnecessary constitutional rigidity.

> "[T]he criminal law test should be confined to criminal prosecutions. 'Beyond a reasonable doubt' is a device to prevent punishment in the wrong cases. In a juvenile case the aim is not punishment but rehabilitation; the risk of 'failing to get him' may be greater than the risk of acting too quickly. This is not to say that evidence is not needed, but merely that the consequences of error are not quite so serious in a juvenile case and therefore we need not be quite so cautious." Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 562 (1957).

Moreover, we are dealing in juvenile proceedings with a trained judge. Thus, the differences in formulation of a burden of proof standard may be more apparent than real. While a jury may have to be impressed with the seriousness and burden of fact-finding in a criminal case, the juvenile judge is aware of both the problem and the consequences. Therefore, however the burden of proof is formulated, the court is likely to reach the same proper result. Thus any increased risk of error is extremely small, if it exists at all. We submit that it is no violation of due process to defer to the legislative judgment as to which risk is greater.

CONCLUSION

The problems of treating neglected, potentially delinquent and delinquent children cannot be adequately dealt with by forcing the proceedings into a criminal mold or by making the applicability of the criminal label depend on the potential disposition. Children and their parents are entitled to due process and fair proceedings whenever the state seeks to intervene in their relationship or to institutionalize the child. To recognize this, however, does not and should not compel the imposition of procedures developed to deal with the different problems of adults charged with crimes. Juvenile proceedings, when carefully developed as in California, are *sui generis* and represent considered legislative judgment as to the best way to deal in a rational and humane manner with the complex problems involved. We urge that this Court defer to the legislative judgment so that the system may evolve as necessary to deal with the problem.

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